Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

MAY LINDA HEYWARD,

Petitioner,

v.

MICHAEL C. MONROE, individually and in his official capacity as District Director of Health Education for the South Carolina Department of Health and Environmental Control and SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN R. HARPER II
1545 Sumter Street
Columbia, South Carolina 29201
(803) 771-4723

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the judgment of the Court of Appeals that the Petitioner was not discriminated against compared to other employees because her dismissal was not similar to theirs in all relevant respects conflicts with decisions of this Court and of other Courts of Appeals requiring only that the misconduct of the plaintiff and of other employees be of comparable seriousness.

LIST OF PARTIES TO PROCEEDING BELOW

The caption of the case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

There are no parent companies or nonwholly owned subsidiaries involved in this case.

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OPINIONS AND ORDERS BELOW

The Magistrate Judge's Report and Recommendation, which recommended dismissal of the Plaintiffs' claims in Civil Action No. 3:95-3400-23, with the exception of Petitioner Heyward's claim for disparate treatment under Title VII against Respondent South Carolina Department of Health and Environmental Control (DHEC), is not reported.

The Order of the United States District Court in Civil Action No. 3:95-3400-23, adopting in part the Report and Recommendation of the United States Magistrate Judge, and entering summary judgment for the Respondents on all claims, is not reported.

The United States Court of Appeals for the Fourth Circuit issued an unpublished per curiam opinion in Case No. 97-2430 affirming the decision of the United States District Court.

The United States Court of Appeals for the Fourth Circuit issued an unpublished opinion in Case No. 97-2430 denying the Petitioner's petition for rehearing.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on December 7, 1998. The judgment of the United States Court of Appeals for the Fourth Circuit denying the Petitioner's petition for rehearing was entered on January

25, 1999. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a) provides, in pertinent part, as follows:

> **(a) Employer practices.** It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as

an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

May Linda Heyward (Heyward) is a black female who was employed by Respondent South Carolina Department of Health and Environmental Control (DHEC) continuously from September 17, 1987 until her termination in January 1992. During her tenure at DHEC, Heyward had an excellent employment record and a reputation for dependability, loyalty, diligence, and progressive approaches, as well as for her community contributions.

In November 1988, Heyward sought a promotion, but the position was given to Respondent Monroe, a white male who was no better qualified than Heyward and who had less or no seniority in the department in which the vacancy existed, while Heyward did have seniority in that department. From about the time that Monroe became Heyward's supervisor, he harassed her and subjected her to discriminatory treatment. On March 16, 1989, for example, Monroe issued Heyward a written reprimand for attending a meeting which was an integral part of her job duties, but which he had instructed her not to attend "due to the higher priority" of meeting with him concerning her performance appraisal. In April/May 1991, similarly, Monroe gave Heyward an action plan notifying her that she was strictly to account for where and with whom she

would be at all times and that he would be checking on her whereabouts. In fact, Monroe continuously monitored Heyward, almost to the point of stalking. On November 15, 1991, Monroe issued another reprimand on Heyward for negligence in following rules.

In April 1989, Heyward complained to the State Human Affairs Commission, which contacted DHEC and attempted to informally resolve the matter. Notwithstanding those efforts by the Commission to resolve the matter, Monroe continued his discriminatory treatment of Heyward. Ultimately, at the first technical opportunity to do so, he terminated Heyward's employment on January 27, 1992, based on the allegation that she had abandoned her position by not coming to work for three consecutive days. Heyward's absence from employment on January 22-24, 1992 was due to an illness which was sufficiently severe that she was unable to report to work. Under DHEC's Employee Handbook, an employee who cannot report to work due to illness is to notify his or her supervisor "as soon as possible." On January 22, Heyward informed Monroe's secretary that Heyward would be unable to report to work. On January 23 and 24, Heyward continued her efforts to speak directly with one or more of her supervisors, but was unable to do so as a result of their unavailability. Notwithstanding the fact that Heyward had directly notified Monroe's secretary of her absence and the reason therefor, Monroe terminated Heyward from her employment on January 27, stating as his basis that Heyward had failed to contact her work area during the three-day period and had, accordingly, abandoned her employment.

The Employee Handbook provides only that if an employee cannot report to work because of illness, the supervisor should be notified "as soon as possible." Whatever the formal policy, the informal policy was one of leniency. During the period of Heyward's employment, seven other employees of DHEC were terminated for job abandonment, but under circumstances in which, unlike in Heyward's case, they were given reasonable notice and an opportunity to explain their absence from work. For example, one white female employee who failed to return to work under similar circumstances, with the difference that she was given written notice that she would be terminated if she did not return by a particular date, was not terminated until a full week after the designated date. Another white employee, who failed for three weeks to either return to work or respond to a letter of inquiry concerning her return, was then terminated, not as of the date of the letter but as of two days thereafter.

On October 16, 1995, Heyward filed a complaint in the United States District Court of the District of South Carolina, Columbia Division. The complaint stated a number of causes of action, including claims that the Respondents discriminated against Heyward because of her race and gender in violation of 42 U.S.C. § 2000e (Title VII) and 42 U.S.C. § 1983, that the Respondents had retaliated against her for filing an informal complaint with the South Carolina Human Affairs Commission concerning her treatment by her immediate supervisor, Respondent Michael C. Monroe, in violation of Title VII, and that the Respondents deprived Heyward of various constitutional rights in violation of § 1983. The complaint also raised several state law claims for breach of contract, breach of the implied covenant of good faith and fair

dealing contained in her contract, and violation of the public policy of South Carolina, as well as a claim by Earl Samuel, Heyward's husband, for loss of consortium.

The case was assigned to the Honorable Joseph R. McCrorey, Magistrate Judge. On January 16, 1997, Judge McCrorey filed a Report and Recommendation in which he concluded that the Petitioner's § 1983 claims and state law claims should be dismissed as being barred by the statute of limitations. (A-21.) He also recommended dismissal of Heyward's claim for a violation of the public policy of South Carolina as not stating a viable cause of action, and the dismissal of Samuel's loss of consortium claim on the ground that Samuel and Heyward were not married at the time of the injury. The Magistrate did, however, recommend the denial of the Respondents' motion for summary judgment as to Heyward's Title VII claim of discrimination based on race and gender, but recommended dismissal of Respondent Monroe in his individual capacity.

On September 16, 1997, the United States District Court, adopting in part the Report and Recommendation of the Magistrate Judge, entered an Order granting summary judgment in favor of the Respondents on all counts. (A-11.)

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court on December 7, 1998 (A-2), and denied the Petitioner's petition for rehearing on January 25, 1999. (A-1.)

The district court had subject-matter jurisdiction over this matter by virtue of 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. §§ 1331 and 1343, and the court's supplemental jurisdiction under 28 U.S.C. § 1367.

ARGUMENT

THE COURT OF APPEALS DECIDED THE QUESTION OF WHETHER THE PETITIONER WAS SUBJECTED TO DISCRIMINATORY DISCIPLINARY ACTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In its decision affirming the summary judgment granted to the Respondents on all counts, the Court of Appeals acknowledged that '[e]vidence showed that other employees were treated more leniently than Heyward." (A-6.) The Court was referring to the seven other employees of the DHEC who were terminated for abandonment during the period of Heyward's employment.

As noted by the Court of Appeals, Heyward contends that the other similarly situated white employees and male employees were provided with notice of pending termination for abandonment and were given more time to resolve the matter. (A-5.) The Court agreed that the white employees and the male employees, although eventually terminated, were either given notice of pending termination or more time to resolve the matter. (A-6.)

The Court upheld dismissal of the discriminatory termination claims, however, on the ground that these employees who were treated more favorably than Heyward were not similarly situated to Heyward.

In deciding that Heyward was not similarly situated to the more favorably treated employees, the Court of Appeals compared Heyward's circumstances especially to those of the two white female employees. The Court observed that one of these employees was on leave of absence status due to a family illness, and the other employee went on medical leave without pay due to a work-related injury. (A-7.) The Court then stated erroneously that "Heyward, on the other hand, did not provide her employer any reason for her absence." (A-7.)

In its discussion of the comparison between the disciplinary treatment of Heyward and the white employees and male employees of DHEC who were disciplined for job abandonment, the Court of Appeals proceeded on the erroneous premise that "she [Heyward] must show that they [the other employees] are similar in all relevant respects." (A-7.) Accordingly, the Court of Appeals placed undue emphasis on the fact that different supervisors were involved in Heyward's situation and that of the other employees. The Court also stressed inconsequential differences between Heyward's case and those of two white female employees, even though all three cases arose from sick leave or leave due to illness in the family. Such a "similar in all respects" standard adopted by the Court of Appeals is in conflict with the less rigid standard of "comparability" which has been accepted by this Court.

This Court has stated:

> Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other "employees involved in acts against [the employer] of *comparable seriousness* . . . were nevertheless retained . . ." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext. 411 U.S., at 804, 93 S.Ct., at 1825 (emphasis added).

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 283 n.11 (1976).

The Court of Appeals' use of the more demanding "similar in all respects" test in this case was in conflict with the "comparability" test adopted by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and *McDonald*. This error led directly to an erroneous affirmance of the dismissal of Heyward's Title VII claims on summary judgment. Under Rule 10(c) of the Rules of the Supreme Court of the United States, this conflict between the Court of Appeals' decision in this case and relevant decisions of this Court on an important question of federal civil rights law affecting many pending and future claims under Title VII of the Civil Rights Act of 1964, weighs in favor of granting this Petition.

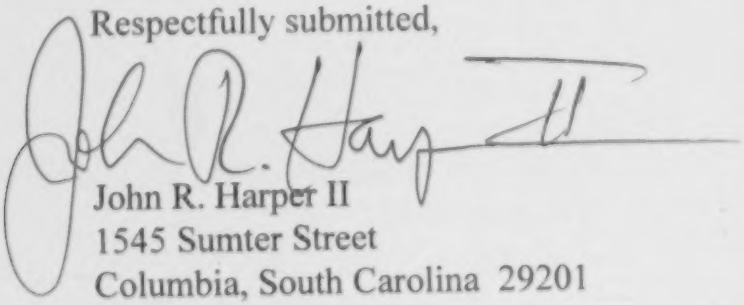
Moreover, the Petitioner invokes Rule 10(a) of the same rules in support of her Petition, since the Court of Appeals' application of a "similar in all respects" standard in this case is at odds with the "comparability" test which other Courts of Appeals have employed in cases of this kind. *See Hargett v. Westminster Bank, USA*, 78 F.3d 836, 839-40 (2d Cir.), *cert. denied*, 117 S. Ct. 84 (1996) (comparable seriousness test allows consideration of positions held by employees, as well as acts committed by them); *Worthy v. United States Steel Co.*, 616 F.2d 698, 703-04 (3d Cir. 1980) (claim alleging discriminatory suspension and demotion remanded for findings as to whether conduct of white workers was of comparable seriousness to conduct of black plaintiff); *Corley v. Jackson Police Department*, 566 F.2d 994, 998-99 (5th Cir. 1978) (district court erroneously ruled for defendants in discriminatory discharge case brought by black employee without considering evidence that white employees committing acts of comparable seriousness were not investigated or discharged); *Friedel v. City of Madison*, 832 F.2d 965, 974 (7th Cir. 1987) (white police recruits dismissed for cheating on exams did not show that employer knew that minority or female recruits were engaged in acts against employer of comparable seriousness); *Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484, 487-88 (8th Cir. 1998) (male nurse alleging discriminatory termination produced sufficient evidence to survive summary judgment; evidence showed that female nurse who engaged in misconduct that was different in type but of comparable seriousness to plaintiff's misconduct was treated more leniently); *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1519 (9th Cir. 1987) (district court erred in denying discovery motion filed by black plaintiff seeking personnel records

to show that white employees who engaged in misconduct of comparable seriousness as plaintiff's misconduct were treated more favorably); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir. 1988) (airline's termination of minority employee for alleged rule violation was pretext for race discrimination; "The fact that . . . other employees did not commit the exact same offense as McAlester, does not prohibit consideration of their testimony. It is sufficient if these employees did acts of comparable seriousness.").

CONCLUSION

For reasons discussed herein, the Petitioner respectfully requests that this Honorable Court grant her Petition for Writ of Certiorari.

Respectfully submitted,



John R. Harper II
1545 Sumter Street
Columbia, South Carolina 29201
(803) 771-4723

Attorney for Petitioner

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

MAY LINDA HEYWARD,

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v.

MICHAEL C. MONROE, individually and in his official capacity as District Director of Health Education for the South Carolina Department of Health and Environmental Control and SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
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APPENDIX

JOHN R. HARPER II
1545 Sumter Street
Columbia, South Carolina 29201
(803) 771-4723

Attorney for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 25, 1999

No. 97-2430
CA-95-3400-23-3

MAY LINDA HEYWARD; EARL SAMUEL

Plaintiffs - Appellants

v.

MICHAEL C. MONROE, individually and in his official capacity as District Director of Health Education for the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Defendants - Appellees

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

MAY LINDA HEYWARD; EARL SAMUEL, *Plaintiffs-Appellants,*	)	
v.	)	
MICHAEL C. MONROE, individually and in his official capacity as District Director of Health Education for the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, *Defendants-Appellees.*	)	No. 97-2430

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Patrick Michael Duffy, District Judge.
(CA-95-3400-23-3)

Submitted: October 27, 1998

Decided: December 7, 1998

Before ERVIN and WILKINS, Circuit Judges, and
PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Hemphill P. Pride, II, Columbia, South Carolina, for Appellants Hardwick Stuart, Jr., William K. Witherspoon, BERRY, ADAMS, QUACKENBUSH & STUART, P.A., Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

May Linda Heyward and Earl Samuel appeal the district court's judgment awarding summary judgment to the Defendants and dismissing their civil complaint. Heyward, who worked for the Defendant South Carolina Department of Health and Environmental Control ("DHEC"), alleged she was discriminated against because of her race and gender and retaliated against for having filed an informal complaint with the South Carolina Human Affairs Commission in violation of Title VII, 42 U.S.C.A. §§ 2000e-2000e-17 (West 1994 & Supp. 1998) ("Title VII") and 42 U.S.C. § 1983 (1994). She also alleged state law claims of breach of contract, breach of implied covenant of good faith and fair dealing, and

violation of South Carolina public policy. Samuel alleged loss of consortium. Finding no reversible error, we affirm.

Heyward, a black female, was employed by the DHEC in September 1987. In November 1988, Michael C. Monroe, a white male, was given a promotion Heyward sought. Monroe became Heyward's supervisor. In March 1989, Monroe reprimanded Heyward for not meeting with him concerning her performance appraisal. Heyward was attending another meeting which Monroe had previously instructed her not to attend.

In April 1989, Heyward met with Bobby Gist of the South Carolina Human Affairs Commission and complained that Monroe was harassing her because of her race. As a result of this contact, a meeting was arranged among Monroe, Gist and Alan Pregnall, Assistant Director of Personnel Services for the DHEC. Pregnall agreed to investigate Heyward's complaints and see what could be done.

In May 1991, Monroe issued Heyward an action plan in order to address proper use of her work time. Among other things, the action plan required Heyward to indicate specifically the places and persons she was visiting when she was out of the office. She was also informed that Monroe reserved the right to make unannounced visits to places where she was scheduled to be. Monroe did make such unannounced visits, and at least one other employee thought the visits were excessive. (J.A. at 105).

On January 22, 1992, Heyward notified her office that she was ill and taking the day off to go to the doctor.

Heyward did not report to work for the next three work days between January 23 and January 27, nor did she contact the office. On January 27, 1992, Monroe concluded that Heyward had abandoned her job because she did not report to work or notify anyone of her whereabouts for three consecutive work days and terminated her employment pursuant to DHEC policy. Heyward contends that other similarly situated white employees were provided with notice of pending termination due to abandonment and more time to resolve the matter.

Heyward married Samuel on April 4, 1992. The instant complaint was filed in October 1995. The magistrate judge concluded that Heyward established a genuine issue of material fact as to whether her termination was based upon Heyward's gender and race. As for her retaliation claim, the magistrate judge found that Heyward failed to raise an inference of retaliation because her protected conduct occurred two years before she was disciplined. The magistrate judge also concluded that the § 1983, breach of contract, and breach of covenant of good faith claims were barred by South Carolina's three-year statute of limitations. With regard to the public policy claim, the magistrate judge recommended it be dismissed because Heyward had statutory remedies. As for the loss of consortium claim, the magistrate judge found Samuel was not entitled to relief because he was not married to Heyward at the time of the alleged injury. He also concluded the claim was barred by the three-year statute of limitations.

The district court largely adopted the magistrate judge's report and recommendation. However, it

dismissed the discriminatory termination claims because it found Heyward was not similarly situated to those individuals who were not terminated in the same manner she was.

We review the grant of summary judgment de novo. *See Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). Summary judgment is appropriate if the pleadings and evidence of record "show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(c). In evaluating a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In order to demonstrate a prima facie case of disparate disciplinary practices, Heyward must show that: (1) she is a member of a protected class; (2) the prohibited conduct in which she engaged was as serious as the misconduct of employees outside the protected class; and (3) the employer imposed harsher disciplinary measures against her than against employees outside the protected class. *See Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511 (4th Cir. 1993).

Evidence showed that other employees were treated more leniently than Heyward. In addition to Heyward, seven other employees, one white male, one black male, two white females, and three black females were terminated for abandonment during the period of Heyward's employment. The seven employees were either given notice of pending termination or more time to resolve the matter; however, all were eventually

terminated. Monroe was not involved in the termination of the seven other employees. Nor was there any evidence that any of the seven employees had a disciplinary history similar to Heyward's.

Heyward has not shown that either the two male employees or the two white female employees were similarly situated. She must show that they are similar in all relevant respects. There is no evidence that the employees "dealt with the same supervisor, [were] subject to the same standards and . . engaged in the same conduct without such mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1982); *see also Arambru v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997). None of the other employees were supervised or disciplined by Monroe. *See Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997) (employees were not similarly situated because they were not supervised by the same person). If different decision makers are involved, employees are generally not similarly situated. *See Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 350 n.3 (7th Cir. 1997).

As far as the two white female employees are concerned, there appear to be mitigating circumstances regarding the difference in treatment, in addition to having different supervisors. One employee was on leave of absence status due to a family illness, the other employee went on medical leave without pay due to a work-related injury. Heyward on the other hand, did not provide her employer any reason for her absence. Nor did she contact Monroe to inform him that she would not attend a meeting between the two of them scheduled for January 27.

Presuming Heyward established a prima facie case, she did not show that DHEC's legitimate reason for her termination was pretextual. Black employees were treated as leniently as white employees and female employees were treated as leniently as male employees. *See Hughes v. Bedsole*, 48 F.3d 1376, 1384-85 (4th Cir. 1995) (evidence that a female was treated more leniently than female plaintiff undercuts argument that reason for discipline was pretext). Thus, we conclude that summary judgment was appropriate on this claim.

Turning to Heyward's claim of retaliation for having complained to South Carolina Human Affairs Commission in April 1989, in order to establish a prima facie case of retaliation, Heyward must prove that: (1) she engaged in a protected activity; (2) adverse employment action was taken against her; and (3) a causal connection existed between the protected activity and the adverse action. *See Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994).

We find this claim fails because Heyward's complaint occurred two years prior to her termination. *See Carter*, 33 F.3d at 460 (temporal proximity between protected activity and adverse employment decision is element of causality). Moreover, there is no evidence linking the protected activity with the adverse employment decision. The evidence of any on-the-job harassment, beyond Heyward's conclusory statements, is slight.

With regard to Heyward's § 1983 claims, there is no federal statute of limitations for § 1983 actions; the analogous state statute governing personal injury actions applies. *See Wilson v. Garcia*, 471 U.S. 261, 280 (1985).

The statute of limitations for such causes of action arising in South Carolina is three years. *See* S.C. Code Ann. § 15-3-530(5) (Law. Co-op. Supp. 1997). Heyward's action accrued when she was terminated on January 27, 1992. She did not commence this action until more than three years later, in October 1995.

Heyward contends that because the parties were in negotiations prior to the commencement of the action, the doctrine of equitable estoppel prevents the Defendants from asserting a statute of limitations defense. In applying the state statute of limitations, the court must also apply state principles of tolling to that limitation period. *See Board of Regents v. Tomanio*, 446 U.S. 478, 485-88 (1980).

The Defendants may be estopped from claiming a statute of limitations defense if the delay is induced by the Defendants' conduct. This may consist of either an express representation that the claim will be settled without litigation or by conduct suggesting a lawsuit is unnecessary. *See Vines v. Self Memorial Hosp.*, 443 S.E.2d 909, 911 (S.C. 1994). Settlement negotiations alone do not bar a statute of limitations defense. *Id.* We agree with the district court that there is no evidence supporting Heyward's contention that the Defendants made an express representation that the claim would be settled. Accordingly, Heyward's § 1983 claims are barred by the statute of limitations. Likewise, the three-year statute of limitations bars Heyward's breach of contract and breach of covenant of good faith claims. *See* § 15-3-530(1).

We also find that Heyward's public policy claim was appropriately dismissed. South Carolina permits an

action under the public policy exception when an at-will employee is terminated for refusing to violate the law. It has not been extended to circumstances where there is a statutory remedy for employment discrimination, as in this case. *See Dockins v. Ingles Mkts., Inc.*, 413 S.E.2d 18, 18 (S.C. 1992).

Finally, we find Samuel's action for loss of consortium also barred by the three-year statute of limitations. His cause of action accrued when he possessed "sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." *See Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996). Even assuming Samuel could not maintain this action until he was married, *see* S.C. Code Ann. § 15-75-20 (Law. Co-op. 1977),* his own affidavit reveals that the cause of action accrued on April 4, 1992, the date he and Heyward married. (R. 24). Since he did not bring this action until October 1995, it is time barred.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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*Section 15-75-20 permits a person to maintain a cause of action for damages arising out of the loss of the right to companionship with their spouse.

FILED
SEPT 16 1997
LARRY W. PROPES, CLERK
COLUMBIA, S.C.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Entered September 16, 1997

SUMMARY JUDGMENT IN A CIVIL CASE

C/A 3:95-3400-23

May Linda Heyward and Earl Samuel,

Plaintiffs,

-versus-

Michael C. Monroe, individually and in his official capacity as director of education for the South Carolina Department of Health and Environmental Control, and the South Carolina Department of Health and Environmental Control,

Defendants.

■ **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered. The Court having adopted in part the Report and Recommendation of the United States Magistrate Judge by Order filed September 16, 1997,

IT IS ORDERED AND ADJUDGED

that summary judgment is hereby entered for the defendants and this matter is concluded in its entirety.

September 16, 1997
Date

LARRY W. PROPES
Clerk

/s/
(By) Deputy Clerk

FILED
SEPT 16 1997
LARRY W. PROPES, CLERK
COLUMBIA, S.C.
ENTERED: 9-16-97

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

MAY LINDA HEYWARD and EARL SAMUEL,	
Plaintiffs,	C.A. # 3:95-3400-23
v.	
MICHAEL C. MONROE, individually and in his official capacity as director of education for the South Carolina Department of Health and Environmental Control, and THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,	
Defendants.	

This matter is before the court upon the magistrate's recommendation that (1) plaintiffs' claims under 42 U.S.C.

§ 1983 and their state law claims should be dismissed because they are barred by the statute of limitations; (2) the claims of Earl Samuel ("Samuel") for a violation of public policy of South Carolina and for loss of consortium are not viable; and (3) the claims of May Linda Heyward ("Heyward") for disparate treatment and retaliation under Title VII against Michael C. Monroe ("Monroe") in his official capacity and against the South Carolina Department of Health and Environmental Control ("DHEC") should proceed. The record contains a report and recommendation of the United States Magistrate made in accordance with 28 U.S.C. § 636(b)(1)(B).

I. TIME FOR FILING OBJECTIONS

A party may object, in writing, to a magistrate's report within ten days after being served with a copy of that report. 28 U.S.C. § 636(b)(1). Three days are added to the ten-day period if the recommendation is mailed rather than personally served. The magistrate's report and recommendation was filed on January 16, 1997. Both plaintiffs and defendants filed timely objections.

II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and

on which the party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-124 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83. v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" *Hughes v. Bedsole*, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir. 1990)), *cert. denied*, 116 S. Ct. 190 (1995). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." *Celotex*, 477 U.S. at 327.

III. REVIEW OF THE MAGISTRATE'S REPORT

This court is charged with conducting a *de novo* review of any portion of a magistrate's report to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendation contained in that report. 28 U.S.C. § 636(b)(1). The magistrate judge's report, except as to that portion addressing

plaintiffs' alleged disparate treatment in Heyward's termination (pp. 13-16), is incorporated into this Order.

A. Defendants' Objections

Defendants object to the magistrate's finding that plaintiffs presented sufficient evidence to show a prima facie case of disparate treatment. The court agrees with defendants. To establish a prima facie case of discrimination regarding disciplinary policies, a plaintiff must show that: (1) she is a member of a protected class; (2) she engaged in prohibited conduct comparable in seriousness to employees not in the protected class; and (3) she was subjected to disciplinary measures more severe than those employees not in the protected class. *See Moore v. City of Charlotte, N.C.*, 754 F.2d 1100 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985). Defendants assert that Heyward failed to show that the employees with whom she sought comparison were similarly situated. Plaintiff must show that the comparable employees are similarly situated in all relevant respects. *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 17 (1st Cir. 1994). "[T]o be deemed 'similarly-situated,' the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992) (citations omitted).

In the present case, Heyward alleges that she was similarly situated to two white employees who were granted extensions of time within which to return to work

after being absent three consecutive days whereas plaintiff's dismissal was mailed on her third consecutive day of absence. These individuals, however, were also ultimately terminated due to absences on three consecutive days without a valid excuse. Defendants show a number of differences between plaintiff and the aforementioned employees. Specifically, plaintiff had been reprimanded repeatedly in the past, and she failed to identify any employee who committed like infractions who was treated differently. Furthermore, none of the compared employees worked under her supervisor, Monroe. Heyward's "unsubstantiated allegations and bald assertions concerning her own qualifications and the shortcomings of her co-workers fail . . . [to] show discrimination" and cannot withstand defendants' motion for summary judgment. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996). Thus, the court finds that Heyward has failed to show that she was subjected to disciplinary measures more severe than those of similarly situated employees.

B. Plaintiffs' Objections

Plaintiffs' first objection is to the magistrate's finding that Heyward failed to present a prima facie case of retaliation. In order to establish a prima facie case of retaliation, a plaintiff must show that (1) she was engaged in a protected activity; (2) she was disciplined; and (3) a causal connection existed between the protected activity and the discipline. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). The employee has the burden to prove that "but for" engaging in then protected activity, she would not have been terminated. *Id.* at 365-66. The court agrees with the magistrate that

the two-year period between the South Carolina Human Affairs Commission ("SCHAC")'s contact with DHEC and the complained of disciplinary actions by DHEC was too long a period of time such that no reasonable trier of fact could infer retaliatory discrimination.

Plaintiff also objects to the magistrate's finding that plaintiffs' claims under 42 U.S.C. § 1983 and their state law claims should be dismissed because they are barred by the three-year statute of limitations.[1] The basis of plaintiffs' objection is that defendants are equitably estopped from raising the statute of limitations defense because "Plaintiffs diligently pursued redress for [Heyward]'s wrongful termination through settlement negotiations with Defendants which took place through efforts of SCHAC. Throughout this process, Defendants falsely assured Plaintiffs of an amicable settlement to the matter." Plaintiffs' Objections at 9.

A defendant may be estopped from asserting the statute of limitations defense if his conduct has induced a

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[1]In addition to plaintiff's objection to the magistrate's application of the statute of limitations to their state law claims, plaintiffs object to the magistrate's finding that they have no viable claim for a violation of South Carolina public policy. The statutes governing SCHAC, §§ 1-13-10 *et seq.*, Title VII, and 42 U.S.C. § 1983 provide remedies for the alleged injuries. Where such statutory remedies are available, the public policy exception to at-will employment situations does not apply. *Dockins v. Ingles Markets, Inc.*, 413 S.E.2d 18, 19 (S.C. 1992).

delay in plaintiffs' filing their suit. *Moates v. Bobb*, 470 S.E.2d 402, 403 (S.C. Ct. App. 1996). The conduct may be express representations either that the claim will be settled without litigation or that a lawsuit is unnecessary. *Id.* However, "settlement negotiations or statements expressing interest in settlement are insufficient to give rise to a claim that a defendant is equitably estopped from asserting the statute of limitations." *Black v. Lexington Sch. Dist. No. 2*, 488 S.E. 2d 327, 331 (S.C. 1997); *see also Moates*, 470 S.E.2d at 403 (Settlement negotiations commenced but never finalized will not bar a defendant from asserting the statute of limitations defense.).

Other than plaintiffs' general statement that they "pursued redress for [Heyward]'s wrongful termination through settlement negotiations," Plaintiffs' Objections at 9, they offer no specific evidence of acts or representations by defendants that induced their failure to comply with the statute of limitations. While evidence of affirmative acts showing that defendants induced plaintiffs to delay filing this action could invoke equitable estoppel, to withstand summary judgment, plaintiffs may not merely rely on unsubstantiated assertions and must set forth specific facts showing that there is a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Accordingly, the court finds that defendants are not estopped from asserting the statute of limitations defense.

Plaintiffs' final objection is to the magistrate's recommendation to dismiss Samuel's claim for loss of consortium. The court agrees with the magistrate that because Samuel was not married to Heyward at the time of the alleged injury, he has no viable cause of action.

IV. CONCLUSION

It is, therefore,

ORDERED, for the reasons articulated above and those in the adopted portions of the magistrate's report, that defendants' motion for summary judgment is **GRANTED.**

AND IT IS SO ORDERED.

/s/ Patrick Duffy

PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
September 15th, 1997

FILED
JAN 16 1997
LARRY W. PROPES, CLERK
COLUMBIA, S.C.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

MAY LINDA HEYWARD AND EARL SAMUEL,	)	Civil Action No. 3:95-3400-28BC
Plaintiffs,	)	ENTERED 1/17/97
vs.	)	
MICHAEL C. MONROE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF EDUCATION FOR THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,	)	MAGISTRATE JUDGE'S REPORT AND RECOMMENDA-ATION
Defendants.	)	

May Linda Heyward ("Heyward") is a former employee of the South Carolina Department of Health and Environmental Control ("DHEC"). She is married to Earl Samuel ("Samuel"). Heyward and Samuel filed this action after Heyward was notified by DHEC that she was terminated because she had abandoned her position. Michael C. Monroe ("Monroe") was her supervisor. Heyward alleges that she suffered discrimination because of her race and gender and that defendants retaliated against her because she filed an informal complaint with the South Carolina Human Affairs Commission ("SHAC"). She also alleges various state law claims. Samuel alleges a loss of consortium.

Defendants filed a motion for summary judgment, and plaintiffs filed a memorandum in opposition. Defendants then filed a reply memorandum.[1] The undersigned has reviewed this record in its entirety. Since defendants have filed a dispositive motion, this Report and Recommendation is for the court's consideration pursuant to 28 U.S.C.§ 636(b)(1) and Local Rule 19.02(B)(2)(f) (D.S.C.).

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[1]Each of these memoranda are supported by various exhibits. "Def. Mem., Ex. ___" will refer to exhibits to defendants summary judgment memorandum. "Reply Mem., Ex. ___" will refer to exhibits attached to defendants' memorandum in reply to plaintiffs' memorandum in opposition to summary judgment. "Pl. Mem., Ex. ___" will refer to exhibits to plaintiffs' opposition memorandum.

Facts[2]

Heyward is a black female who was employed by DHEC as a Health Educator II from September 17, 1987 until January 27, 1992.[3] In 1988 plaintiff sought the position with DHEC of District Director of Health Education for the East Midlands Public Health District. However, Monroe (a white male) was selected for the position and became Heyward's supervisor in November of 1988. In April of 1989 Heyward contacted Bobby D. Gist, Depute Director of SHAC, and complained that she was denied the position because of her race and that she was being harassed by Monroe. Gist contacted DHEC personnel officials to attempt to address Heyward's allegations without the filing of a formal complaint. On April 18, 1989, Gist met with Heyward and a DHEC personnel official to discuss the situation and possible solutions including future promotion, transfer and improving the conditions of Heyward's employment. Apparently these changes did not materialize. No formal complaint was ever filed concerning discrimination in the

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[2]The court is obliged to construe the facts and all reasonable inferences in the light most favorable to plaintiffs at this stage. Therefore, the facts recited herein are largely distilled from plaintiffs' memorandum in opposition to summary judgment, pages 1-6.

[3]DHEC takes the position that Heyward abandoned her position by being absent from work for three consecutive days without notifying her supervisor. Heyward argues that she was terminated. See discussion below.

1988 promotion and subsequent harassment until after Heyward was terminated. (Def. Mem., Ex. A).

On March 16, 1989, Monroe issued Heyward a written reprimand after she left Monroe's office and the Office of the District Director to attend a meeting after Monroe directed her not to do so. Monroe Aff., Ex. A. Monroe had required Heyward to meet with him on that date to discuss her objections to her employee appraisal. Apparently Heyward did not seek to challenge this written reprimand by filing an internal grievance.[4]

Although the relationship between Heyward and Monroe was not cordial after the written reprimand was issued, there appears to have been no significant difficulties between the two until April of 1991. According to Monroe, he learned that Heyward left a seminar two hours early and did not return to the office until the end of the seminar. After receiving this information, Monroe "confirmed" that on several occasions Heyward did not go to places she indicated she was going when she checked out of the office. Monroe discussed this issue with Heyward and gave her an action plan which notified her that he would be checking on her whereabouts. Monroe Aff., ¶ 6. The written action plan dated May 6, 1991, is Ex. D-1 to Monroe's Affidavit.

Monroe issued Heyward a second written reprimand on November 15, 1991 for "Negligence in

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[4]The undersigned assumes that this written reprimand was one of the reasons that Heyward contacted Gist in April of 1989.

Following Rules." (See Monroe Aff., Ex. D). One of Heyward's responsibilities was to collect "baseline assessment data" from churches. Heyward's data was to be turned in to her team leader (Ms. Wessinger) by October 31, 1991. According to the written reprimand, on that date Wessinger asked Heyward about the data. Heyward reportedly told Wessinger that she had collected the data but needed to transfer the data from her notes to forms for typing. On November 6, 1991, Monroe inquired of Wessinger if the assessment data had been completed. Wessinger then told Monroe that Heyward had not turned in her data. Monroe then told Wessinger to notify Heyward that her data would have to be turned in by 2:00 p.m. that day. According to the written reprimand, on that same day Heyward asked Wessinger and other employees in her office about their churches and recorded the information on the data assessment form. Monroe concluded from this sequence of events that Heyward's previous statements that she had already collected the assessment data were untrue and that Heyward had acted unprofessionally by collecting the data within her office instead of surveying churches in the community as she was required to do.

Apparently, Heyward disagreed with Monroe's decision in issuing this second reprimand. In her affidavit, she states that she "strongly contested" the reprimand. Heyward Aff., ¶ 14. James E. Deaton, Jr. was Monroe's immediate supervisor during this time. In his affidavit, he states that he became aware of the reprimand discussed it with both Heyward and Monroe and determined that "the written reprimand was appropriate and should be upheld."

In the fall of 1991, Monroe informed Heyward that her position was going to be changed form health promotion to educational services to prenatal clients. Monroe and Heyward met and specifically discussed this change on December 13, 1991. (Def. Mem. Ex. A, p. 245). Apparently in mid December of 1991, Monroe developed a written job description of the new position and asked Heyward for written comments, including the percentage of her time that would be involved in the nine enumerated "job tasks" (Pl. Ex. B).[5] Heyward was to respond to the memorandum as soon as possible as she was to begin her new duties at the beginning of 1992. Heyward did not respond because she was preparing a response to the written reprimand she received in November of 1991 and continuing her other workload.

On January 20, 1992, Monroe confronted Heyward and asked her to sign the job description he had previously developed. She refused indicating that she had not finished writing her comments about her concerns with respect to the new position. Heyward told Monroe that she would telefax her comments later in the day. Because Monroe did not receive the comments, he telephoned Heyward at 4:35 p.m. Heyward completed her comments on the evening of January 20, 1992. However, she did not telefax them to Monroe on that date or deliver them to Monroe on the following day. Instead on January 21, 1992, she delivered a copy of her comments to the DHEC

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[5]This exhibit is a collection of hand-written notes and documents prepared by Monroe. The final job description is attached as Exhibit E to an affidavit by Monroe on July 5, 1996.

central office. Heyward mailed Monroe a copy of her comments on January 24, 1992. (Pl. Mem., Ex. A, pp. 276-290).

Heyward was to met with Monroe on January 27, 1992 at 1:00 p.m. to discuss the job description and her comments. Heyward's written comments dated January 20, 1992 discussed above (see Pl. Mem., Ex. C) begin with an apology for the delay and explains that she had been ill for the past two weeks (i.e., two weeks prior to January 20, 1992) and was under the care of a physician. Monroe responded to Heyward's comments by a memorandum dated January 22, 1992 (Pl. Mem., Ex. D). With respect to being under a doctor's care, Monroe's memorandum stated:

> Please clarify for me what you are inferring. If the reason for this care will affect your ability to perform your job, then I need you to provide me with a statement from you (sic) physician clearly stating this fact.

On the morning of January 22, 1992, Heyward telephoned Monroe's office and left a message that she would be out sick on that day and was going to the doctor. (Pl. Mem., Ex. F). Heyward did not call in on January 23, 24 or 27[6] and did not come to work. She did not contact Monroe on January 27 and she did not appear for her previously scheduled appointment for that date to discuss her job description. At 4:56 p.m. on January 27, 1992, Monroe mailed Heyward a letter from the Irmo, South Carolina Post Office advising her that she was terminated

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[6]Apparently January 25 and 26 were the weekend.

for "job abandonment" because she had been absent for three consecutive workdays without contacting her office (Pl. Mem., Ex. H). DHEC's Progressive Discipline Guides state that termination is the appropriate disciplinary action for first offense abandonment of position for three consecutive workdays. (Def. Mem., Ex. B).

Heyward sought review of the termination decision pursuant to the internal employee grievance procedure adopted by DHEC. At this point according to state law, Heyward was not entitled to an evidentiary hearing. DHEC denied Heyward's grievance. Heyward then filed an appeal with the State Employee Grievance Committee. The Committee held a two-day evidentiary hearing. (Def. Mem., Ex. C, pp. 203). On September 29, 1992, the Committee issued a Final Decision in favor of DHEC. The Committee found as fact that Heyward did not report to work or notify her supervisor that she would not be at work for three consecutive workdays. The Committee concluded:

> The Appellant's failure to call in on January 23, 24, and 27, even though she was aware of the policy that required calling in as soon as possible, constituted intent to violate that policy. Therefore, the Agency followed its policy in terminating the Appellant. (Def. Mem., Ex. B).

Heyward appealed the decision of the Committee by seeking judicial review pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. § 1-23-380 (1986). By Order of the Honorable L. Henry McKellar, Circuit Court Judge of the Fifth Judicial Circuit,

the Committee's decision was upheld. Judge McKellar found that the Committee committed no error of law in reaching its decision that Heyward abandoned her position and that substantial evidence supported its decision. (Def. Mem., Ex. C). The South Carolina Supreme Court affirmed Judge McKellar's decision on April 10, 1995 (Def. Mem., Ex. D).

Heyward filed an administrative charge of discrimination with SHAC on October 29, 1992. She asserted in that charge that she had been subjected to race discrimination and retaliation for contacting SHAC in 1989.[7] (Pl. Mem., Ex. I). The record indicates that the parties, through SHAC, attempted but failed to reach a settlement in the matter. Then, on several occasions, plaintiff's counsel sought a determination and a right-to-sue letter. (Pl. Mem., Ex.'s P, Q, R, and S). SHAC issued its determination in favor of DHEC and a right-to-sue letter on June 16, 1995. The present litigation was filed on October 16, 1995.

Samuel met Heyward in 1989. They were married on April 4, 1992. The marital relationship of Samuel and Heyward has been injured by the emotional trauma associated with her termination from DHEC. See Affidavit of Samuel filed September 16, 1996.

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[7]Nothing in the charge related to sex discrimination. However, defendants have not asserted that Heyward failed to exhaust her administrative remedies with respect to her sex discrimination claim.

Standard for Summary Judgment

When no genuine issue of any material fact exists, summary judgment is appropriate. *Sheely v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* Courts take special care when considering summary judgment in employment discrimination cases because states of mind and motives are often crucial issues. *Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1005 (4th Cir.), *cert. denied*, 484 U.S. 897 (1987). This does not mean that summary judgment is never appropriate in these cases. To the contrary, "'the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material fact*.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

In this case, defendant "bears the initial burden of pointing to the absence of a genuine issue of material fact." *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 718 (4th Cir. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If defendant carries this burden, "the burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact." *Id.* at 718-19 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)).

Moreover, "once the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial." *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 874-75 (4th Cir. 1992). The non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Id.* and *Doyle v. Sentry Inc.*, 877 F. Supp. 1002, 1005 (E.D.Va. 1995). Rather, the non-moving party is required to submit evidence of specific facts by way of affidavits [see Fed. R. Civ. P. 56(e)], depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *Baber*, citing *Celotex Corp.*, *supra.* Moreover, the non-movant's proof must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." *Mitchell v. Data General Corporation*, 12 F.3d 1310, 1316 (4th Cir. 1993) and *DeLeon v. St. Joseph Hospital, Inc.*, 871 F.2d 1229, 1233 (4th Cir. 1989), n.7. Unsupported hearsay evidence is insufficient to overcome a motion for summary judgment. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547 (5th Cir. 1987) and *Evans v. Technologies Applications & Services Co.*, 875 F. Supp. 1115 (D.Md. 1995).

Discussion

Plaintiffs state ten separate causes of action in their complaint as follows:

1. A violation of Heyward's rights to free speech and association pursuant to 42 U.S.C. § 1983;

2. A violation of Heyward's rights to equal protection and due process guaranteed by the Fourteenth Amendment pursuant to 42 U.S.C. § 1983;

3. Retaliation against Heyward for filing a charge of discrimination pursuant to the South Carolina Human Affairs Law and Title VII;[8]

4. Discrimination against Heyward based on race and gender pursuant to 42 U.S.C. § 1983;

5. Discrimination against Heyward based on race and gender pursuant to Title VII and 42 U.S.C. § 1983;

6. Monroe subjected Heyward to invidious race and gender discrimination;

7. Breach of contract;

8. Breach of the implied covenant of good faith and fair dealing contained in the contract;

9. Violation of the public policy of South Carolina; and

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[8]The undersigned assumes this claim is actually alleged retaliation against Heyward for informally contacting SHAC in 1989.

10. Loss of consortium on the part of Samuel.

a. Federal Claims.

In their original memorandum in support of their summary judgment motion, defendants argue that they are entitled to summary judgment only as to plaintiffs' fifth cause of action on substantive grounds. They argue that they are entitled to summary judgment on the other claims based upon various statutes of limitation, failure to state a claim, and lack of standing. However, in their reply memorandum defendants make further argument with respect to Heyward's third cause of action. Therefore, the undersigned will attempt to analyze defendants' summary judgment claims for race and gender discrimination and retaliation.

One other issue requires discussion before beginning an analysis of Heyward's discrimination claims. In their reply memorandum, defendants correctly assert that Heyward is collaterally estopped[9] from relitigating whether she abandoned her position for three consecutive work days. This issue was fully litigated through the

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[9]Defendants raise this issue under the heading of "res judicata." Res judicata ("claim preclusion") prevents relitigation of claims. On the other hand, collateral estoppel ("issue preclusion") prevents relitigation of identical issues in later suits on any cause of action. *Allen v. McCurry*, 449 U.S. 90 (1980) and *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984).

grievance procedure, the evidentiary hearing before the State Employee Grievance Committee, and subsequent appeals to the Circuit Court and Supreme Court. "It is well established that judicial affirmance of an administrative determination is entitled to preclusive effect." *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 481 n.21 (1986). This doctrine applies to judicially reviewed administrative determinations in the employment discrimination context. See, for example, *Kirkland v. City of Peerskill*, 828 F.2d 104 (2nd Cir. 1987) and *Rider v. Commonwealth of Pennsylvania*, 850 F.2d 982 (3rd Cir. 1988). Thus, the issue before this court is not whether Heyward abandoned her position for three consecutive work days, but whether she was subjected to disparate treatment because of her race and/or gender for this infraction of DHEC's published policy.

1. Race and Gender Discrimination.

Heyward was disciplined and ultimately terminated pursuant to DHEC's published "Progressive Discipline Guide." The Guide lists a number of "Personal Conduct/Work Deficiencies" which subject an employee to discipline. One of the enumerated items is "Abandonment of position for three (3) consecutive working days." Although supervisors are given discretion to deal with violations on a case by case basis, the Guide contains a "Disciplinary Guide Chart" which suggests appropriate discipline for a first, second, or third offense of each of the enumerated violations. The suggested discipline for a first offense of abandonment of position for three consecutive work days is termination.

The defendants analyze Heyward's claims under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) as a "straight" termination case. They cite *Rush v. McDonnell Corp.*, 966 F.2d 1004 (7th Cir. 1992) as an analogous case. However, the plaintiff in *Rush* was not terminated pursuant to a discipline plan. Based on the record, the undersigned concludes that Heyward's claims are properly construed as disparate treatment in discipline as opposed to "straight" termination. This, of course, requires a slightly different standard than the one employed by the parties in their pleadings.

In order to establish a prima facie case of discrimination in enforcement of disciplinary policies, a plaintiff must show:

> 1. She is a member of a protected class;
>
> 2. She engaged in prohibited conduct comparable in seriousness to employees outside the protected class; and
>
> 3. She was subjected to disciplinary measures more severe than those imposed on the employee outside the protected class.

See *Moore v. City of Charlotte, NC*, 754 F.2d 1100 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985); *Johnson v. Burnley*, 887 F.2d 471 (4th Cir. 1989); *Cook v. CSX Transportation Corporation*, 988 F.2d 507 (4th Cir. 1993); and *Hughes v. Bedsole*, 48 F.3d 1376 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 190 (1995).

As discussed above, the record reveals four separate instances of discipline imposed on Heyward by Monroe: (1) the written reprimand dated March 16, 1989; (2) the action plan dated May 6, 1991; (3) the written reprimand dated November 15, 1991; and (4) Heyward's termination of January 27, 1992 for abandonment of her position. Heyward has failed to identify any other employee who failed to follow a specific directive given by Monroe who was not given a written reprimand; or who signed out for certain places and went to other places who was not placed on an action plan; or who was cited for negligence in following rules and did not receive a written reprimand. Heyward merely states in her affidavit filed September 16, 1996 that "no other employee under said defendant's (i.e., Monroe's) supervision received *any* disciplinary measure." Heyward characterizes these instances as "mistreatment" and argues that because she received these disciplinary measures, she was treated unfairly. However, she has not identified any employee who committed like infractions who was treated differently. See *Moore*, 754 F.2d at 1107 and *Johnson*, 887 F.2d at 479.

The exhibits to defendants' reply memorandum identify eight DHEC employees, including Heyward, who were terminated for abandonment of their job for three consecutive work days.[10] A thorough review of these

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[10]Other than Heyward, one white male, one black male, two white females, and three black females were terminated for abandonment of position for three consecutive work days by DHEC between January 1, 1990 and April 26, 1993. None of these other employees were

exhibits reveals that other DHEC employees who were terminated under this provision were either not immediately terminated after three days or they were given the opportunity to notify DHEC that they did not intend to return to their jobs. Jennifer Gilliam, a black female, was due to return to work on March 5, 1991, but did not return. She was terminated in June of 1991. Shirley Welch, a white female, took a leave of absence due to a family illness. She requested that her leave be extended until June 28, 1991. She was written and told that if she had not reported by 5:00 p.m. on June 28, 1991, that she would be terminated. She was terminated by letter of July 5, 1991. Amy Melvin, a black female, last contacted DHEC on October 1, 1992. She was written on October 12, 1992 and terminated by letter of October 20, 1992. Joyce Cunningham, a white female, went on medical leave on June 13, 1991. She did not respond to DHEC's letter of March 23, 1993 and was terminated by letter of April 14, 1993.

Admittedly, these records are sparse but seem to indicate (in the light most favorable to Heyward) that DHEC's procedure [is] not to immediately terminate its employees on the third day of absence under this provision. They were either afforded a longer period of absence, or written and told that if they did not contact DHEC by a specified date, they would be terminated. These procedures generally applied to blacks and whites.

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supervised or terminated by Monroe. Further, plaintiff has identified no employee who abandoned his or her position for three or more consecutive work days who was not ultimately terminated.

The undersigned concludes that Heyward has demonstrated a prima facie case of gender and race discrimination with respect to disparate treatment in discipline involving her termination. She is a member of a protected class; she was disciplined; and she was treated differently than the other employees (two of whom were white).

Having presented a prima facie case of discrimination, the burden shifts to defendants to proffer a non-discriminatory reason for Heyward's termination. *Hughes v. Bedsole*, 48 F.3d at 1383. They, of course, cite the already established fact that Heyward abandoned her position for more than three consecutive workdays. However as noted earlier, the issue is whether Heyward was treated differently on account of her race or gender. No other employee identified in this record was terminated by letter typed on the third day of absence and mailed at or before the close of business on that day. The record suggests that DHEC was generally lenient in enforcing this disciplinary provision. Departure from a "usual business procedure" is probative of pretext. *Warren v. Halstead Industries, Inc.*, 802 F.2d 746, 753 (4th Cir. 1986) *cert. denied*, 487 U.S. 1218 (1988). Heyward has established a genuine issue of material fact as to whether her termination and DHEC's deviation from its normal procedures was based on Heyward's gender or race.

2. Retaliation.

Heyward's third cause of action alleges that she was disciplined because she informally contacted SHAC in 1989 because Monroe was given the position of District Director of Health Education for which she had applied.

There is no question that Mr. Gist of SHAC met with DHEC officials and attempted to informally resolve Heyward's complaint. Therefore, DHEC and, presumably, Monroe were aware of Heyward's complaint.

In order to establish a prima facie case of retaliation, a plaintiff must prove that:

1. she engaged in a protected activity;

2. she was disciplined; and

3. a causal connection existed between the protected activity and the discipline.

Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985); *Williams v. Cerberonics, Incorporated*, 871 F.2d 452, 457 (4th Cir. 1989); *McNairn v. Sullivan*, 929 F.2d 974, 977 (4th Cir. 1991); and *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994). As with a Title VII discrimination cases [sic], if the employee establishes a prima facie case, the employer is required to come forward with legitimate nonretaliatory reasons for the disciplinary action or discharge. The burden of proof then shifts to the employee to prove that the employer's proffered reasons are pretextual. The employee has the burden throughout to show that "but for" engaging in the protected activity, she would not have been terminated. *Ross* at 365-66 and *Williams* at 459.

A plaintiff need not have filed a formal complaint with the EEOC or a state deferral agency to engage in a protected activity. Complaints to supervisory or management employees concerning harassment or

discriminatory treatment as well as informal, [sic] filing of internal grievances, and complaints to an agency are included within the definition of protected activity. *Warren v. Halstead Industries, Inc.*, 802 F.2d 746 (4th Cir. 1986), *cert. denied*, 487 U.S. 1218 (1988) and *Mitchell v. Baldrige*, 759 F.2d 80 (D.C. Cir. 1985).

Frequently, a plaintiff can establish this element when the discipline took place in close proximity to the filing of an administrative charge or a hearing or other event held in connection with the charge. See *Warren v. Halstead Industries, Inc.*, *supra* (plaintiff filed EEOC charge on January 15 and terminated on January 20) and *Carter v. Ball*, *supra* (plaintiff filed EEOC complaints in September of 1988 and February of 1990, hearing held June 14, 1990, and plaintiff demoted in July of 1990). Also see *Oliver v. Digital Equipment Corporation*, 846 F.2d 103 (1st Cir. 1988) (thirty-three months lapse between filing of charge and termination insufficient to establish retaliation); *Samuelson v. Durkee/French/Airwick*, 976 F.2d 1111 (7th Cir. 1992) (three years insufficient); and *Jennings v. Uniroyal Plastics Co.*, 1989 WL 125601 (N.D. Ind.) (two years insufficient).[11]

In the present case, Gist met with the DHEC officials on April 18, 1989. The written action plan for

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[11]These cases are cited in *Hott v. Vdo Yazaki Corporation*, 922 F. Supp. 1114 (W.D.Va. 1996) where the court determined that a fifteen-month period between the filing of a charge and termination created an issue for the jury.

Heyward was dated in May of 1991, some twenty-five months later. However, the record demonstrates that the controversy over Heyward's not being where she was supposed to [be] began in April of 1991. Plaintiff has included copies of handwritten notes Monroe kept on Heyward as a part of the record. Pl. Mem., Ex. B. Those notes indicate that the seminar Heyward was supposed to have left two hours early was held on April 8, 1991. Further, Monroe noted similar incidents on April 9, 12, 16, and 18. Monroe's notes reflect that he began to formulate the action plan on April 19, 1991 and met with Heyward on April 29, 1991 to discuss the action plan with her. Significantly, the notes contain very little information about contacts between Heyward and Monroe between the April 18, 1989 SHAC meeting and the notes beginning April 8, 1991. A note of December 11, 1989 relates to a change in office hours and a note from June 5, 1990 indicates that Heyward appeared to lack initiative during a planning session. Nothing in any of the notes mentions the fact that Heyward had contacted SHAC.

The undersigned concludes in the light most favorable to Heyward that the first action taken against Heyward was in April of 1991, exactly two years after SHAC contacted DHEC. Based on the cases cited above, the undersigned finds that the two year period between SHAC's contact with DHEC and the events which led to the action plan is too long to raise an inference of retaliation.

Further, the record appears not to contain evidence of other disciplinary measures or problems during this two-year period. The undersigned, therefore, concludes

that Heyward has failed to demonstrate a prima facie [case] of retaliation.

3. Section 1983.

As listed above, plaintiffs' first, second, fourth, and fifth causes of action are brought in whole, or in part, under 42 U.S.C. § 1983. Defendants argue that these claims are barred by South Carolina's statute of limitations.[12]

The United States Supreme Court has stated unequivocally that the state law concerning limitation of actions applies in claims brought under § 1983. In *Wilson v. Garcia*, 471 U.S. 261, 266 (1985), the Court stated

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. (Footnote omitted.) In 42 U.S.C. § 1988, Congress has implicitly endorsed this approach with respect to claims enforceable under the Reconstruction Civil Rights Acts.

See also Burnett v. Gratton, 468 U.S. 42 (1984) and *Owens v. Okure*, 488 U.S. 235 (1989). The Court also endorsed the need for statutes of limitations, saying

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[12]Defendants do not suggest that plaintiffs' claims are precluded on this basis insofar as they are alleged under Title VII.

> A federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." . . . Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost.

Wilson v. Garcia, *supra* at 271, citing *Adams v. Woods*, 2 Cranch 336, 342 (1805).

In South Carolina, the statute of limitations is six (6) years for claims arising before April 5, 1988, and three (3) years for claims arising after that date. See S.C. Code Ann. § 15-3-530. The time of accrual of an action under § 1983 is a question of federal law. *Cox v. Staton*, 529 F.2d 47 (4th Cir. 1975). An action accrues when the plaintiff knew of, or should have known of, the factual basis of his claim. Generally, state tolling rules apply if they are not inconsistent with § 1983's purposes. *Hardin v. Straub*, 490 U.S. 536 (1989). South Carolina's statutory tolling provisions appear in S.C. Code Ann. § 15-3-30 et *seq.* None of these provisions appear to apply to these plaintiffs' claims, and they have not argued that they apply. Instead, plaintiff's [sic] assert that any delay in filing was caused by SHAC's delay in issuing the right-to-sue letter. They cite *Fouche v. Jekyll Island State Park Authority*, 713 F.2d 1518 (11th Cir. 1983) as authority. However, that case is inapposite. *Fouche* deals with equitable tolling of a Title VII claim pending issuance of a right-to-sue letter. There is no requirement that a plaintiff exhaust administrative remedies before filing a § 1983 action in this court. The coupling of time barred § 1983 claims with timely Title VII claims does not defeat or toll the statute of

limitations. Claims under § 1983 "are 'separate, distinct, and independent' from those provided under Title VII." *Simmons v. South Carolina State Ports Authority*, 495 F. Supp. 1239, 1246 (D.S.C. 1980),[13] aff'd 694 F.2d 63 (1982) citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975). See also, *Love v. Alamance County Board of Education*, 757 F.2d 1504 (4th Cir. 1985) and *Gantlin v. Westvaco Corporation*, 526 F. Supp. 1356, 1384 (D.S.C. 1981) (plaintiffs allowed to proceed on Title VII claims where parallel § 1983 claims were time barred) and *Davis v. Bethlehem Steel Corporation*, 600 F. Supp. 1312 (D.Md. 1985) (§ 1981 claims parallel to Title VII claims time barred unless they present violation within limitations period).

The undersigned concludes that plaintiffs' claims accrued on January 27, 1992 when Heyward was terminated. The tolling provisions contained in the South Carolina statutes do not apply. Plaintiffs filed this action on October 16, 1995.[14] Therefore, plaintiffs' claims brought pursuant to 42 U.S.C. § 1983 are barred by the statute of limitations.[15]

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[13]The events in *Simmons* occurred prior to April 5, 1988 when the statute of limitations changed from six to three years.

[14]The accrual date, filing date and inapplicability of state tolling provisions likewise apply to plaintiffs' state claims discussed below.

[15]Based on this conclusion, the undersigned will not address defendants' argument that Monroe is entitled to qualified immunity.

b. State Claims.

Defendants assert that plaintiffs' state law claims are also barred by the South Carolina statute of limitations.

1. Contract Claims

Heyward's seventh and eighth claims are based on breach of an implied contract and on breach of a covenant of good faith and fair dealing in that implied contract. S.C. Code Ann. § 15-3-530(1) provides for a statute of limitations of three years on contract claims. If there was an implied contract between Heyward and Cooper, it was breached on January 27, 1992. Therefore, the undersigned concludes that plaintiffs' contract claims are barred by the statute of limitations.

2. Public Policy.

Heyward's ninth cause of action alleges that defendants' actions constitute a violation of the public policy of South Carolina entitling her to relief. Defendants argue that this claim fails to state a claim under South Carolina law, and even if it does state a claim, it is barred by the statute of limitations.

In *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985), the South Carolina Supreme Court recognized a public policy exception to at-will employment situations. In that case, an at-will employee was presented a Hobson's choice of not testifying pursuant to a subpoena or being fired. The employee testified and was fired. The court held, "Where the retaliatory discharge of an at-will employee constitutes violation of a

clear mandate of public policy, a cause of action in tort for wrongful discharge arises." *Id.* at 216. This cause of action has been extended to at least legislatively defined "crimes against public policy["] (S.C. Code Ann. § 16-17-10 *et seq.*). *Culler v. Blue Ridge Electric Cooperative*, 422 S.E.2d 91, 92 (S.C. 1992).

Heyward argues that her discharge violated the public policy of South Carolina against race and gender discrimination. The South Carolina Human Affairs Law (S.C. Code Ann. § 1-13-10 *et seq.*), as well as Title VII and 42 U.S.C. § 1983, provide remedies for such violations. Where such statutory remedies are available, the public policy exception does not apply. *Epps v. Clarendon County*, *supra*, and *Dockins v. Ingles Markets, Inc.*, 413 S.E.2d 18 (S.C. 1992). Since Heyward has statutory remedies for her termination, she is not entitled to maintain an action under the public policy exception to her employment-at-will status.

Even if this claim survived, it is precluded by the three-year statute of limitations found in S.C. Code Ann. § 15-3-530(5).

3. Loss of Consortium.

Samuel has alleged a claim for loss of consortium in the tenth cause of action. Defendants argue that Samuel lacks standing to assert this claim, and even if he has standing, the claim is barred by the statute of limitations.

S.C. Code Ann. § 15-75-20 provides in part:

> Any person may maintain an action for damages arising from an intentional or tortious violation of the right to companionship, aid, society and services of his or her spouse.

Generally, a spouse's right to sue on such a claim accrues at the time the loss of services occurs. This is generally defined as the time of injury. *Berry v. Myrick*, 194 S.E.2d 240 (S.C. 1973); *Preer v. Mims*, 476 S.E.2d 472 (S.C. 1996).

Heyward and Samuel were not married at the time of termination, January 27, 1992. They married on April 4, 1992. Although it does not appear that South Carolina has addressed the issue, generally

> [C]ourts have denied recovery for loss of consortium where the injury occurs before the marriage. Frequently observing that the right of consortium grows out of the marital relationship, these courts have refused to allow recovery for loss of consortium on the ground that the respective spouses were not married at the time of the injury.

Charles J. Plovanich, *Recovery for loss of consortium for injury occurring prior to marriage*, 5 A.L.R.4th 300 (1981).

It is clear from the record that the alleged injury to Heyward occurred prior to marriage. Samuel describes Heyward's injury in his affidavit. He describes the effect

of the "constant struggle" Heyward had with Monroe; her depression over not being promoted in 1989; her "decline" and "sickness" at the end of 1991 and beginning of 1992; and her shock, dismay, and devastation upon her termination. Samuel's affidavit clearly demonstrates that the alleged injuries to Heyward occurred prior to her termination and their marriage. Therefore, at the time of the injury, Samuel possessed no marital right and on the occasion of their marriage, he took Heyward in her then existing condition. *Rademacher v. Torbensen*, 13 N.Y.S.2d 124 (1939).

Even if this were not true, Samuel's claim is precluded by the statute of limitations. Assuming that Samuel's right to sue accrued on the date of their marriage, this action was not filed within the three years required by S.C. Code Ann. § 15-3-530(2).

Conclusion

In summary, the undersigned concludes that plaintiffs' claims under § 1983 and their claims based on state law should be dismissed because they are barred by the statute of limitations. Further, Heyward's claim for a violation of the public policy of South Carolina is not viable, and Samuel has no claim for loss of consortium because he and Heyward were not married at the time of the alleged injury. If the Court accepts this Report and Recommendation, Heyward's claim for disparate treatment in disciplinary action involving her termination under Title VII against DHEC and Monroe in his official capacity would survive. Monroe should be dismissed as a party defendant in his individual capacity as Title VII actions against state officials in their individual capacities are

inappropriate. Title VII actions are available only against the "employer." 42 U.S.C. § 2000e(n). *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993); *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11th Cir. 1992).

Respectfully submitted,

/s/
Joseph R. McCrorey

January 16, 1997
Columbia, South Carolina

Supreme Court, U.S.
F I L E D
MAY 25 1999
CLERK

NO. 98-1709

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

MAY LINDA HEYWARD,

Petitioner,

v.

MICHAEL C. MONROE, individually and in his official capacity as District Director of Health Education for the South Carolina Department of Health and Environmental Control and SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Hardwick Stuart, Jr.
Berry, Quackenbush & Stuart, PA
Post Office Box 394
Columbia, South Carolina 29202
(803) 771-4723

Attorney for Respondents

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REASONS FOR DENYING THE PETITION

It is the Petitioner who is confused as to the test to be applied in alleged discriminatory discipline cases. The Fourth Circuit is not in conflict with the other circuits or the United States Supreme Court in applying the "similar in all respects" burden of proof to the Petitioner. The "comparable seriousness" test advanced by the Petitioner should be applied to the misconduct itself and is in addition to the Petitioner's burden to demonstrate that the employees to be compared with herself were "similar in all respects." Furthermore, the Fourth Circuit's emphasis on the fact that different supervisors were involved is not "undue," but entirely appropriate and followed by the other circuits.

The Petitioner cites the United States Supreme Court case of McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 965 S.Ct. 2574, 49 L.Ed.2d 493 (1976), and cases from other circuits to support her position that a less rigid standard of "comparability" has been accepted by the United States Supreme Court and the other circuits in contrast to the "similar in all respects" used by the Fourth Circuit. According to the Petitioner, the "comparability" test is separate, distinct, and in conflict with the "similar in all respects" test.

Incorrectly, the Petitioner takes the term "comparable seriousness" out of the context, which

is the "culpability" and "misconduct" of the employees. McDonald, 427 U.S. 273, 283 n. 11 (1976). Contrary to the Petitioner's assertion that the Fourth Circuit is "at odds" with the other circuits, the cases cited by the Petitioner in fact support the Fourth Circuit's application of the "similar in all respects" standard.

From the Second Circuit, the Petitioner cites Hargett v. National Westminster Bank, USA, 78 F.3d 836 (2nd Cir. 1996), cert. denied, 117 S.Ct. 84 (1996), for the proposition that the Second Circuit is applying the less stringent comparability test than the Fourth Circuit. The Petitioner conveniently ignores the portion of the decision (on the same pages cited by Petitioner) wherein the Second Circuit states:

> As Defendants accurately note, this statement does not imply the determination of whether acts are of "comparable seriousness" requires a myopic examination of the acts alone without regard to the context or surrounding circumstances. Nothing in McDonnell precludes a finding that identical acts undertaken by persons of differing authority or in differing circumstances are not in fact dissimilar.

Hargett at Page 839. See also Shumway v. United Parcel Service, Inc., 118 F.3d 60, 64 (2nd Cir. 1997)

wherein the Sixth Circuit held: "To be 'similarly situated' the individuals with whom Shumway attempts to compare herself must be similarly situated in all materials respects."

Petitioner also cites Worthy v. United States Steel Co., 616 F.2d 698, 703-04 (3rd Cir. 1980), in support of her position. However, the Second Circuit in Worthy did not reject the similarly situated test, but in effect found it "particularly relevant." The Third Circuit held: "Particularly relevant to such a showing would be evidence that white employees with comparable records were not similarly treated." Worthy at 702.

In the Fifth Circuit, the Petitioner relies on Corley v. Jackson Police Department, 566 F.2d 994, 998-99 (5th Cir. 1978). The Fifth Circuit in Corley does not reject the similarly situated test, but references "similarly treated" and uses "comparable" in the context of offenses. See Corley at 999-1000, n. 7.

In the case Friedel v. City of Madison, 832 F.2d 965 (7th Cir. 1987), the focus of the Seventh Circuit was on acts or violations of the plaintiffs. In Friedel, the Court determined that the acts of the plaintiffs were not of "comparable seriousness" to those who were not dismissed because the plaintiffs were involved in more incidences of cheating on exams at the police academy and were in fact the ring leaders. See Friedel at Page 974-975. The Seventh Circuit in Friedel never had to

reach the issue of similarly situated in terms of discipline in that the plaintiffs were not able to show that any female or minority recruits were engaged in nearly identical conduct. In addition, Petitioner ignores the more recent Seventh Circuit decisions, which apply the similarly situated test to the employer's disciplinary actions. See Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343 (7th Cir. 1997), at n. 3, Page 350.

When citing Lynn v. Deaconess Medical Center-West Campus, 160 F.3d 484, 487-88 (8th Cir. 1998), the Petitioner totally disregards the Eighth Circuit's holding that the plaintiff "has the burden of proving that he and the disparately treated female nurses were 'similarly situated in all relevant respects.'" Lynn at 487.

In Garrett v. City & County of San Francisco, 818 F.2d 1515 (9th Cir. 1987), the Ninth Circuit merely references McDonald and the "comparable seriousness" of the acts of wrongdoing and does not address the similarly situated issue. Therefore, the Petitioner cannot maintain that the Fourth Circuit is in conflict with the Ninth Circuit.

With regard to McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988), the Petitioner failed to consider the more recent Tenth Circuit case of Aramburu v. The Boeing Co., 112 F.3d 1398 (10th Cir. 1997). In Aramburu, the Tenth Circuit held:

> To assert a claim of disparate treatment, the plaintiff must show that he was treated differently than other similarly situated employees who violated work rules of comparable seriousness.... "Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline."

Aramburu at 1404. (Citations omitted.)

The best analysis of the distinction and interrelationship between "comparable seriousness" and "similarly situated in all respects" is in Harrison v. Metro Government of Nashville, 80 F.3d 1107 (6th Cir. 1996). The Sixth Circuit held:

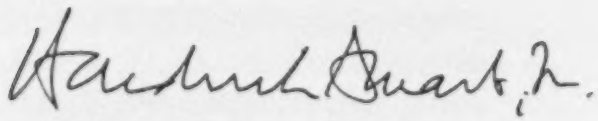
> The Supreme Court has noted that in comparing employment discipline decisions, "precise equivalence in culpability between employees" is not required. . . .Rather, the plaintiff must simply show that the employees were engaged in misconduct of "comparable seriousness." . . .The plaintiff must also demonstrate that the non-minority employees to be compared with himself were "similarly-situated in all respects."

Harrison at 1115. (Citations omitted.)

CONCLUSION

The Fourth Circuit is not in conflict with the Supreme Court or with the other circuits in terms of its application of the similarly situated test and emphasis on the employee's supervisor. It appears that the Petitioner has selectively focused on the term "comparable seriousness" in the McDonald case and cited other cases in the various circuits which in turn relied on McDonald. Petitioner ignored any portions of these cases which reference the similarly situated test and did not search for any subsequent relevant cases in those circuits. In short, the Petitioner's analysis is selective, incomplete and incorrect.

Respectfully submitted,



Hardwick Stuart, Jr.
Berry, Quackenbush & Stuart, PA
Post Office Box 394
Columbia, South Carolina 29202
(803) 779-2650
Attorney for Respondents